MILITARY COMMISSION

UNITED STATES OF AMERICA	)	**P-002**
	)	
	)	**RULING:**
v.	)	**Government Motion for Appropriate Relief (120 Day Continuance)**
IHRAHM AHMED MOHMOUD al QOSI aka ABU KHOBAIB al SUDANI	)	**Dated: 16 July 2009**

1. On 15 May 2009, the Government filed a Motion for Appropriate Relief, requesting any further proceedings in the above action be delayed until at least 17 September 2009. On 22 May 2009, the Defense filed a Defense Response to Government Motion for Appropriate Relief, asking the request be denied. On 28 May 2009, the Government filed a Reply to Defense Response for Appropriate Relief. On 15 July 2009, the Defense filed a Submission of Attachments to their 22 May 2009, Defense Response. The Defense also filed a Bench Brief on the Issue of Excludable Delay on 15 July 09. On 16 July 2009, the Government filed a Government Response to the Defense Submission of Attachments to Defense Response to Government Motion for Appropriate Relief (120 Day Continuance).

2. On 22 January 2009, the President issued Executive Order (E.O.) 13,493 which directed an interagency Task Force to "conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." The E.O. directed the Task Force complete its work by 21 July 2009.

3. On 23 January 2009, the Government requested a continuance until 20 May 2009. The Defense did not file an opposition to the request. On 20 May 2009, the Court granted the continuance.

4. The review being conducted by the Task Force has yet to be finalized. However, on 15 May 2009, the SecDef published and notified Congress of five significant changes to the Manual for Military Commissions (MCM). They include proposed changes to jurisdictional issues, establishment of a right to "individual military counsel", removal of the requirement to instruct the members regarding an accused not being subject, in some situations, to cross-examination when he offers his own hearsay 'statement but does not testify, prohibition of the use of statements, in some situations, obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained, and

revision of one of the rules dealing with hearsay evidence. Additionally, there remains the possibility that any charges of material support for terrorism may be dismissed.

5. The Government submits, as they did in their January 2009 continuance request, that this Motion for an additional continuance is in the best interest of justice. They argue that the continuance will serve the interests of justice and the Accused, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the Military Commissions process as a whole. They further assert that it would be inefficient and potentially unjust to both the government and the defense to deny the continuance.

6. The Defense requested the government motion be denied. They argue that the Court had not excluded the previous 120 Day continuance for speedy trial purposes, that the continuance has and will further interfere with the Accused's ability to prepare for trial by failing to provide discovery and/or access to relevant witnesses, and that the government will continue its obstructive tactics during any additional continuance. However, subsequent to the 22 May 2009 defense response, the government did provide defense with over 2500 pages of discovery, as well as the contact information for two potentially relevant witnesses.

7. On 15 May 2006, the Defense filed a Submission of Attachments to the 22 May 2009, Defense Response to the Government Motion to Appropriate Relief (120 Day Continuance). On 16 July 2009, the Government filed a response to the Defense's Request to submit attachments and asked that the Court not consider these documents. In essence, the matters submitted by the defense in the Attachment consisted of several documents submitted to the Guantanamo Review Task Force in support of the Accused's repatriation to Sudan. The submission contained, in part, letters from family members, a letter to the Secretary of State, and affidavits from the Civic Aid International Organization in Sudan. In support of their request that the charges be dismissed and the request for a continuance be denied, the Defense argues that the Accused's chance at repatriation is diminished if he carries the stigma of a charged detainee. Whether the Accused is a proper candidate for repatriation to Sudan is not a question to be answered by the Court. Nor is it a compelling reason to deny the continuance. It is the responsibility of the Interagency Task Force, not the Court, to review the detainee's case and make a recommendation regarding his final disposition and whether that includes repatriation to Sudan. Therefore, while the Court did review the matters contained in the 15 July 2009 Submissions of Attachments; they were considered irrelevant in regards to the Court's determination of whether or not to grant the requested 120 Day continuance.

8. Additionally, the Defense has previously filed a Motion to Suppress statements of the Accused, alleging they were products of torture and/or coercion. The Defense has also filed a Motion to Dismiss Charge II, Material Support for Terrorism, alleging an invalid ex post facto law and that this offense does not properly constitute a violation of the law of war. Given the proposed extensive changes to the MCA, which include the ban on admission of statements obtained by cruel, inhuman and degrading statements as well as the removal of the offense of Material Support for Terrorism from those chargeable under the MCA, it would be premature and injudicious for the Court to proceed and rule on these motions at this time.

9. When the Court granted the 26 January 2009, Government Request for a Continuance, it did so after having made a determination that the interests of justice served by the

continuance outweighed the best interests of both the public and the accused. Accordingly, that delay should be excluded when determining any time period under R.M.C. 707.

10. The Court further finds that continuing these proceedings until 17 September 2009 is in the interests of justice as well as the best interests of both the public and the accused. The continuance will allow time for the proposed changes to the military commission rules to be implemented. It would be an injustice to the Accused should the Court continue, especially given the likely extensive changes to the MCA. Additionally, there was no evidence presented that the Government requested this continuance for the purpose of obtaining unnecessary delay, or for any other inappropriate reason.

WHEREFORE, based on the above, the Government Motion for Appropriate Relief, (120 Day Continuance) is **GRANTED.** The proceedings will be continued until 17 September 2009. The time period from 23 January 2009 to 17 September 2009 is excludable for speedy trial purposes under R.M.C. 707.

However, should the Government request a subsequent delay for the same or similar reasons as set forth in their 15 May 2009, Continuance Request, any request will be considered by the Court with increased scrutiny and skepticism.

Nancy J Paul

NANCY J. PAUL, Lt Col, USAF
Military Judge

UNITED STATES OF AMERICA v. IBRAHIM AHMED MAHMOUD AL QOSI a/k/a ABU KHOBAIB al SUDANI	**Government Motion for Appropriate Relief** **15 May 2009**

1. **Timeliness**: This motion is timely filed.

2. **Relief Requested**: In the interests of justice, the Government respectfully requests the Military Commission grant an additional 120-day continuance of the proceedings in the above-captioned case, until 17 September 2009.[1]

3. **Overview**: A second continuance is in the interests of justice, and, given the circumstances, outweighs the interests of both the public and the accused. On 22 January 2009, the President ordered comprehensive reviews of detention policy (including military commissions), and of all the individual detainees at Guantanamo (including the accused in this military commissions case). Those reviews are not yet complete, but significant progress has been made. The President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo (attachment G). As a first step, and as a result of the Detention Policy Task Force's initial work, on 15 May 2009 the Secretary of Defense published and notified Congress of five significant proposed changes to the Manual for Military Commissions (attachment D), including rules that would exclude all statements obtained by the use of cruel, inhuman or degrading treatment, impose additional conditions on the use of hearsay, and provide the accused greater latitude in the selection of counsel. As required by law, however, proposed modifications to the procedures in effect in military commissions cannot take effect for 60 days from 15 May 2009. The Administration is committed to taking further steps to ensure that commissions are part of an overall system that best protects U.S. national security and foreign policy interests while also insisting that justice is done in the case of every single detainee. These steps will include working with the Congress now and in the future to reform our military commissions system to better serve those purposes. The Administration will shortly be proposing legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, not only to make the five rule changes noted above statutory, but also to make other significant changes to the commissions, including revising the rules governing classified evidence and further revising the rules regarding the admissibility of evidence. We anticipate that these changes will nevertheless permit cases pending before commissions to proceed, though no decisions have yet been made as to which specific detainees will continue to be prosecuted before commissions or whether they might be prosecuted in

[1] The Government is seeking similar 120 day continuances in the other pending military commissions cases.

Article III courts, or whether some alternative disposition of the detainees might be recommended. Given these issues, the Government submits that the interests of the public and the accused would best be served by granting the continuance in this case.

4. **Burden and Persuasion**: As the moving party, the Government bears the burden of persuasion. RULES FOR MILITARY COMMISSIONS (R.M.C.) 905(c), MANUAL FOR MILITARY COMMISSIONS (MMC), 2007.

5. **Facts**:

a. On 22 January 2009, the President issued Executive Order (E.O.) 13,492, "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities" (attachment A). This E.O. directed an inter-agency review of "the status of each individual currently detained at Guantánamo." Exec. Order No. 13,492, §4(a), 47 Fed. Reg. 4897 (Jan. 27, 2009). The review participants[2] were tasked, first, to "determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States," and second, in the cases of those individuals not approved for release or transfer, "to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution . . ." *Id.* at §4(c)(2)-(3).

b. E.O. 13,492 also directed the Secretary of Defense to "ensure that during the pendency of the Review . . . all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered . . . are halted." *Id.* at §7 (emphasis added).

c. On 22 January 2009, the President also issued E.O. 13,493, "Review of Detention Policy Options" (attachment B). Exec. Order No. 13,493, 47 Fed. Reg. 4901 (Jan 27, 2009). E.O. 13,493 established a Detention Policy Task Force co-chaired by the Attorney General and the Secretary of Defense, "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." E.O.13,493, § 1(e). The E.O. directs that this Task Force complete its work in 180 days (i.e., by 21 July 2009). *Id.* at §1(g).

d. Consistent with the President's order that steps be taken sufficient to halt military commissions during the pendency of the review, the Secretary of Defense ordered that no new charges be sworn or referred to commissions, and directed the Chief Prosecutor of the Office of

[2] E.O. 13,492 directed that the following officers participate in the review: The Attorney General, the Secretaries of Defense, State, and Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and such other officers or employees of the United States as determined by the Attorney General. E.O. 13,492, §4(b).

Military Commissions to seek continuances of 120 days in all cases that had been referred to military commissions (attachment C).

e. In accord with that direction, on 23 January 2009, the Government sought a continuance in the above-captioned case until 20 May 2009, which the court granted on 26 January 2009.

f. In compliance with E.O. 13,492, the Detainee Review Task Force is actively considering detainees' cases. It has made recommendations resulting in decisions to transfer or release more than 30 individuals. The status of the accused in the above-captioned case is under active consideration by one of the Task Force's Detainee Review Teams, which will make a recommendation on the disposition of the accused to the principals appointed by the President pursuant to E.O. 13,492 (attachment A). Under E.O. 13,492, the Secretary of Defense must ensure that these proceedings are halted at least until that review is complete.

g. Further, as a result of the initial work of the Detention Policy Task Force, the Secretary of Defense has published five proposed changes to the Manual for Military Commissions (attachment D):

(1) Delete R.M.C. 202(b), MMC 2007, eliminating the dispositive effect, for purposes of jurisdiction for trial by a military commission under the M.C.A., of a prior determination by a Combatant Status Review Tribunal (or other competent tribunal) that an individual is an "unlawful enemy combatant."

(2) Revise R.M.C. 506, MMC 2007, to establish a right to "individual military counsel" of the accused's own choosing, provided the requested counsel is assigned as a defense counsel within the Office of the Chief Defense Counsel and is "reasonably available."

(3) Remove the language in the "Discussion" under MILITARY COMMISSION RULES OF EVIDENCE (M.C.R.E.) 301, MMC 2007, that directs the military judge to instruct the members they should consider the fact the accused did not subject himself to cross-examination when he offers his own hearsay statement at trial but does not testify.

(4) Prohibit the use of statements obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained. This would be accomplished by removing the distinction, in the standard for admissibility, between statements obtained before 30 December 2005 and those obtained on or after that date – which now potentially permits the admission of statements obtained by the use of cruel, inhuman or degrading treatment prior to 30 December 2005 – and applying the standard currently in M.C.R.E. 304(c)(2), MMC 2007, to all statements.

(5) Revise M.C.R.E. 803(c), MMC 2007 to give the proponent of hearsay that is not otherwise admissible under M.C.R.E. 803(a) the burden of demonstrating that a reasonable commission member could find the evidence sufficiently reliable under the totality of the circumstances to have probative value.

h. Pursuant to Section 949a(d) of Title 10, United States Code, the Secretary of Defense must inform the Committees on Armed Services of both the House and Senate of proposed modifications to the procedures in effect for military commissions at least 60 days before they go into effect.

i. The Secretary communicated these changes to the Armed Services Committees on 15 May 2009, and they are scheduled to go into effect on 14 July 2009.

j. The Administration also is working with the Congress on legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366 in order to codify these rule changes and to further change the law governing military commissions. Other significant changes being considered are revisions to the rules governing the use of classified information, further revisions of the rules concerning the admissibility of evidence, and adjustments to the class of individuals subject to the jurisdiction of the commissions.

k. In short, the interagency teams are actively engaged in a thorough assessment of all the issues directed for review by the President. However, at this point that work is not complete and, while much has been accomplished, the Government does not at this time know precisely how the military commissions will be reformed, or even what the disposition of this particular accused will be, including whether he will be tried by military commission. As stated before, the review of this individual is not complete, and the 180-day Detention Policy Review is not due to be completed until 21 July 2009.

6. **Argument**:

a. Rule for Military Commissions (RMC) 707(b)(4)(E)(i) authorizes the military judge of a military commission to grant a continuance of the proceedings if the interests of justice are served by such action and outweigh the best interests of both the public and the accused to a prompt trial of the accused. For all of the reasons stated above, the Government submits that it would serve the interests of justice and the accused to grant the motion for continuance.

b. The requested continuance is in the interests of justice, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the military commissions' process as a whole.

c. The interests of justice served by granting the continuance outweigh the interests of both the public and the accused. Granting a continuance of the proceedings is in the interests of the accused and the public, as the Administration's review of the commissions process and its pending cases might result in changes that would (1) necessitate re-litigation of issues in this case; or (2) if the case were to proceed at some later date, produce legal consequences affecting the options available to the Administration and the accused. It would be inefficient and potentially unjust to deny the continuance motion in this case before there is a final decision to proceed with this military commission—a commission that would, if resumed, proceed under a new set of rules.

d. Extending the continuance in this case for an additional 120 days, from 20 May 2009 until 17 September 2009, will permit adequate time for the Administration to complete its review

of the military commissions process and of the pending cases, to take appropriate actions to implement the five rules changes noted above, and to work with the Congress to further revise and reform the commissions process to ensure that it best serves the national security and foreign policy interests of the United States and the interests of justice. The reason for seeking the requested delay, therefore, is not inconsistent with the interests of justice. To the contrary, it is intended to ensure the President has the time and opportunity to complete the policy and case-by-case reviews and to propose and implement changes to military commissions law and procedure, some of which will be best effected by legislation. In these circumstances, the additional delay of 120 days is not prejudicial to the accused nor is it inconsistent with the interests of the public.

7. **Scope of Request:** Questions have arisen concerning the scope and effect of continuances that the Government has sought and that the judges have granted in commissions cases. The Executive Order directs the Secretary to take steps "sufficient to halt the proceedings," and it was in accord with that obligation that the Secretary directed the Chief Prosecutor to seek the continuances that are now in place.[3]

The United States wishes to clarify the scope of the continuances that it now seeks. The Government does not seek to preclude the parties from submitting any filings, if they wish. The purpose of this motion is, in effect, to preserve the status quo as it existed on 22 January 2009 and as it exists on this date, and to preclude any unnecessary judicial decisions on contested questions until the President decides whether and on what terms, and as to which accused, the military commissions will resume. For that reason, the Government is asking the court not to take any actions in the case—whether or not any "sessions" of court are involved—with the exception of any rulings the court must make (including a ruling on the instant motion itself) in order to preserve the status quo as of this date to the greatest practicable extent.

8. **Conclusion**: For the foregoing reasons, the military commission should extend the previously granted continuance of further proceedings in the above-captioned case until 17 September 2009, and adopt the attached Findings of Fact, Conclusions of Law and Order. (Attachment E). Additionally, this delay should be excluded when determining whether any period under RMC 707(a) has run.

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[3] The Government's previous motions requesting continuances did not attempt to define the scope of the requested continuance; but in some cases, military judges have defined the scope of the continuance in ordering it. In the case against Ahmed Khalfan Ghailani, for instance, the continuance issued by the military judge expressly contemplated that discovery by the parties would continue, and that the judge would continue to take certain actions that do not require a "session." *See* Ruling on Government Motion for Continuance, *United States v. Ghailani* (Feb. 13, 2009). Similarly, in the case against the five charged September 11th co-conspirators, *United States v. Khalid Sheikh Mohammed*, the military judge recently issued a ruling (in response to a defense motion for relief related to the submission to the court of a document by the defendants) in which he assumed the prosecutors had not sought—and the military judge, in his earlier ruling on the continuance, had not ordered—"a 'halt' to any and all actions related to this case, but merely on the record hearings with counsel, the accused, and the military judge." The military judge concluded that his ruling was consistent with the prosecution's request and his earlier grant of a continuance, because "[s]ince recessing on 21 January 2009, the military judge has not called the Military Commission *into session*." Order on Defense Motion for Special Relief, *United States v. Mohammed* (Mar. 18, 2009) (emphasis added). *See* R.M.C. 905(h) (providing that the military judge may dispose of written motions without a session of the commission).

9. **Oral Argument**: The Government does not request oral argument, but is prepared to argue should the commission find it helpful.

10. **Witnesses and Evidence**: No witnesses. The Government respectfully requests the commission to consider the attachments to this motion as evidence of the asserted facts.

11. **Certificate of Conference**: The Government was unable to successfully confer with the Defense prior to filing this Motion.

12. **Attachments**:

A. E.O. 13,492, 47 Fed. Reg. 4897 (Jan. 27, 2009)
B. E.O. 13,493, 47 Fed. Reg. 4901 (Jan. 27, 2009)
C. Secretary of Defense Order, dated 20 Jan 09
D. Amendments to Manual for Military Commissions, 2007
E. Proposed Findings of Fact and Conclusions of Law
F. Olsen Declaration, dated 14 May 09
G. Wiegmann and Martins Declaration, dated 13 May 09

13. **Submitted by**:

K. Sachs
Maj, U.S. Air Force
Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301
[redacted]

S. Quinn
Capt, U.S. Marine Corps
Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301
[redacted]

T. Cox
Capt, U.S. Air Force
Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301
[redacted]

ATTACHMENT A

Presidential Documents

Executive Order 13492 of January 22, 2009

Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. *Definitions.* As used in this order:

(a) "Common Article 3" means Article 3 of each of the Geneva Conventions.

(b) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(c) "Individuals currently detained at Guantánamo" and "individuals covered by this order" mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. *Findings.*

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals

have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109–366, as well as of the military commission process more generally.

Sec. 3. *Closure of Detention Facilities at Guantánamo.* The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. *Immediate Review of All Guantánamo Detentions.*

(a) **Scope and Timing of Review.** A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) **Review Participants.** The Review shall be conducted with the full cooperation and participation of the following officials:

(1) the Attorney General, who shall coordinate the Review;

(2) the Secretary of Defense;

(3) the Secretary of State;

(4) the Secretary of Homeland Security;

(5) the Director of National Intelligence;

(6) the Chairman of the Joint Chiefs of Staff; and

(7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) **Operation of Review.** The duties of the Review participants shall include the following:

(1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. *Diplomatic Efforts.* The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. *Humane Standards of Confinement.* No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

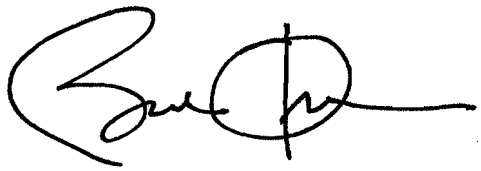
Sec. 7. *Military Commissions.* The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. *General Provisions.*

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 22, 2009.

[FR Doc. E9–1893
Filed 1–26–09; 11:15 am]
Billing code 3195–W9–P

ATTACHMENT B

Presidential Documents

Executive Order 13493 of January 22, 2009

Review of Detention Policy Options

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. *Special Interagency Task Force on Detainee Disposition.*

(a) **Establishment of Special Interagency Task Force.** There shall be established a Special Task Force on Detainee Disposition (Special Task Force) to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.

(b) **Membership.** The Special Task Force shall consist of the following members, or their designees:

(i) the Attorney General, who shall serve as Co-Chair;

(ii) the Secretary of Defense, who shall serve as Co-Chair;

(iii) the Secretary of State;

(iv) the Secretary of Homeland Security;

(v) the Director of National Intelligence;

(vi) the Director of the Central Intelligence Agency;

(vii) the Chairman of the Joint Chiefs of Staff; and

(viii) other officers or full-time or permanent part-time employees of the United States, as determined by either of the Co-Chairs, with the concurrence of the head of the department or agency concerned.

(c) **Staff.** Either Co-Chair may designate officers and employees within their respective departments to serve as staff to support the Special Task Force. At the request of the Co-Chairs, officers and employees from other departments or agencies may serve on the Special Task Force with the concurrence of the heads of the departments or agencies that employ such individuals. Such staff must be officers or full-time or permanent part-time employees of the United States. The Co-Chairs shall jointly select an officer or employee of the Department of Justice or Department of Defense to serve as the Executive Secretary of the Special Task Force.

(d) **Operation.** The Co-Chairs shall convene meetings of the Special Task Force, determine its agenda, and direct its work. The Co-Chairs may establish and direct subgroups of the Special Task Force, consisting exclusively of members of the Special Task Force, to deal with particular subjects.

(e) **Mission.** The mission of the Special Task Force shall be to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.

(f) **Administration.** The Special Task Force shall be established for administrative purposes within the Department of Justice, and the Department of Justice shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support and funding for the Special Task Force.

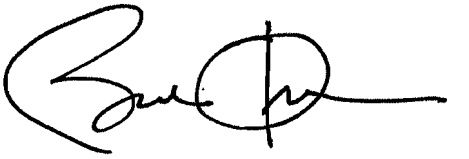
(g) **Report.** The Special Task Force shall provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, on the matters set forth in subsection (d) within 180 days of the date of this order unless the Co-Chairs determine that an extension is necessary, and shall provide periodic preliminary reports during those 180 days.

(h) **Termination.** The Co-Chairs shall terminate the Special Task Force upon the completion of its duties.

Sec. 2. *General Provisions.*

(a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 22, 2009.

[FR Doc. E9–1895
Filed 1–26–09; 11:15 am]
Billing code 3195–W9–P

ATTACHMENT C

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JAN 20 2009

MEMORANDUM FOR THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS
CHIEF PROSECUTOR, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Military Commissions

Pursuant to the Military Commissions Act of 2006 and the authority vested in me as the Secretary of Defense, I hereby direct the Convening Authority for Military Commissions to cease referring cases to military commissions immediately. I direct the Chief Prosecutor of the Office of Military Commissions (OMC) to cease swearing charges, to seek continuances for 120 days in any cases that have already been referred to military commissions, and to petition the Court of Military Commission Review to hold in abeyance any pending appeals for 120 days.

This is to provide the Administration sufficient time to conduct a review of detainees currently held at Guantanamo, to evaluate the cases of detainees not approved for release or transfer to determine whether prosecution may be warranted for any offenses these detainees may have committed, and to determine which forum best suits any future prosecution.

This order does not preclude continued investigation or evaluation of cases by the OMC.

cc:
General Counsel of the Department of Defense
Chief Judge, Military Commissions Trial Judiciary
Chief Defense Counsel, Office of Military Commissions

ATTACHMENT D

FIVE CHANGES TO MILITARY COMMISSION RULES

In brief, the changes are:

1. Remove references to the Combatant Status Review Tribunal within Rule for Military Commission 202 and specify that a commission is a "competent tribunal" for purposes of determining the jurisdictional predicate;

2. Remove the discussion section within Military Commission Rule of Evidence 301, which directs the military judge to instruct commission members to consider that the accused did not subject himself to cross-examination if the accused introduces his own hearsay statements at trial but does not testify;

3. Modify Military Commission Rule of Evidence 304 to render inadmissible all evidence the judge deems to have been secured as a result of cruel, inhuman, or degrading treatment within the meaning of the Detainee Treatment Act;

4. Provide for a right of individual military counsel in Rule for Military Commissions 506, permitting a right to counsel of choice within the office of the Chief Defense Counsel;

5. Modify Military Commission Rule of Evidence 803(c) to reverse the burden of proof regarding hearsay statements from a requirement that the opponent establish unreliability to a requirement that the proponent establish reliability.

1. *Remove references to the Combatant Status Review Tribunal within Rule for Military Commission 202.*

Rule for Military Commissions (R.M.C.) 202 currently states that a finding by a Combatant Status Review Tribunal ("CSRT") or by another "competent tribunal" is dispositive for purposes of jurisdiction for trial by military commission, as provided in 10 U.S.C. § 948d. In practice, however, CSRTs determine whether an individual is an "enemy combatant," not whether an individual is an "unlawful enemy combatant." In the military commission case against Salim Ahmed Hamdan, the military judge decided that the CSRT's findings were insufficient to establish jurisdiction, because the CSRT decided enemy combatant status, not unlawful enemy combatant status. The commission made its own determination that Hamdan was an "unlawful enemy combatant," thereby satisfying the jurisdictional predicate required by the MCA. In doing so, it concluded that the commission was an "other competent tribunal established under the authority of the President or the Secretary of Defense," the finding of which as to unlawful enemy combatant status is dispositive for purposes of jurisdiction under 10 U.S.C. § 948d and R.M.C. 202. This proposed rule modification would eliminate the rule text that provides that a CSRT determination of "unlawful enemy combatant" status is dispositive for jurisdictional purposes and would establish that a military commission is a "competent tribunal" to determine that the accused is an unlawful enemy combatant and thus subject to commission jurisdiction.

R.M.C. 202(b) would, therefore, read as follows (the areas crossed through would be deleted; areas underlined would be added):

Rule 202. Persons subject to the jurisdiction of the military commissions

(a) *In general.* The military commissions may try any person when authorized to do so under the M.C.A.

(b) *Competent Tribunal.* A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

~~(b) *Determination of unlawful enemy combatant status by Combatant Status Review Tribunal or other competent tribunal dispositive.* A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A. The determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals.~~

Discussion

Military commissions have personal jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. A military commission is a competent tribunal to make a finding sufficient for jurisdiction. *See* 10 U.S.C. § 948a(1)(ii) and § 948d(c). ~~The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the Combatant Status Review Tribunal ("C.S.R.T.") process to determine an individual's combatant status. The C.S.R.T. process includes a right of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because the C.S.R.T. process provides detainees with the opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of the personal jurisdiction of a military commission. The M.C.A. provides that an individual is deemed an unlawful enemy combatant for purposes of the personal jurisdiction of a military commission if the individual has been determined to be an unlawful enemy combatant by a C.S.R.T. or other competent tribunal. Where combatant status of the accused may otherwise be relevant, the parties may establish the accused's status by evidence adduced in accordance with the commission rules. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government's obligation to prove beyond a reasonable doubt the elements of each substantive offense charged under the M.C.A. and this Manual.~~

~~*Combatant Status Review Tribunal.* The M.C.A. provides that an alien determined to be an unlawful enemy combatant by a C.S.R.T. shall be subject to military commission jurisdiction, whether the C.S.R.T. determined was made "before, on, or after the date of the enactment" of the M.C.A. *See* 10 U.S.C. § 948a(1)(ii). At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an "enemy combatant" if he "was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners." The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.~~

~~*Other Competent Tribunal.* The M.C.A. also provides that an individual shall be deemed an "unlawful enemy combatant" if he has been so determined by a competent tribunal established consistent with the law of war. *See* 10 U.S.C. § 948a(1)(ii).~~

~~The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.~~

(c) *Procedure.* The jurisdiction of a military commission over an individual attaches upon the swearing of charges.

2. *Remove the discussion section within Military Commission Rule of Evidence 301 that directs the military judge to instruct members to be wary of hearsay statements offered by an accused who does not testify.*

Military Commission Rule of Evidence ("M.C.R.E.") 301 addresses the privilege against self-incrimination that applies in military commission proceeding. Although a defendant before a commission is privileged from testifying against himself, the discussion section of the rule directs that if the defendant offers his own prior hearsay statements but does not testify at the proceeding, the military judge "shall instruct" the members of the commission that they may consider the fact that the accused chose not to be cross-examined on the hearsay statements, and that his statements are not sworn testimony. The proposed rule change would eliminate the requirement of this instruction and leave the issue of instructions to the discretion of the military judge. M.C.R.E. 301 would read (deletions are crossed through):

Rule 301. Privilege concerning compulsory self-incrimination

* * * * *

(e) *Waiver by the accused.* When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified.

~~**Discussion**~~

~~If the accused voluntarily introduces his own prior hearsay statements through the direct examination of a defense witness, but the accused exercises his right not to testify himself at the proceeding, the military judge shall instruct the members prior to the beginning of their deliberations: "The accused has the absolute right to testify as a witness or to choose not to testify in this proceeding. That the accused exercised (his)(her) right not to testify should not be held against (him)(her). However, in this case, the accused has voluntarily offered his prior statements as part of (his)(her) defense by eliciting those statements through other defense witnesses. At the same time, the accused, by electing not to testify in the proceeding, has prevented the Government from subjecting those statements to cross-examination. In evaluating the weight to be accorded to the accused's hearsay statements, you may consider the fact that the~~

~~accused chose not to be cross-examined on those statements and that those statements were not sworn testimony."~~

3. *Remove the distinction between pre- and post-Detainee Treatment Act statements analyzed for coercion.*

Under M.C.R.E. 304(c), the admissibility of statements allegedly obtained through coercion depends upon satisfaction of certain criteria, which differ depending on whether the statements were obtained before or after December 30, 2005, the date of enactment of the Detainee Treatment Act ("DTA"). M.C.R.E. 304(c) provides that a judge may admit an allegedly coerced statement made ***before*** the effective date of the Detainee Treatment Act only if the military judge finds that the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence. By contrast, a military judge may admit a statement made ***after*** the effective date of the Detainee Treatment Act only if he or she finds that the statement is reliable and sufficiently probative, that the interests of justice would best be served by admission of the statement into evidence, *and* that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment.

The proposed rule change would eliminate the difference in the criteria for the admissibility of statements made before and after December 30, 2005. As amended, M.C.R.E. 304(c) would provide that in *all* cases where the degree of coercion used to obtain a statement is disputed, a military judge may admit the statement only if he or she finds that it was not obtained using interrogation methods that constitute cruel, inhuman, or degrading treatment (and if the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence).

The applicable portions of M.C.R.E 304(c) would read as follows (deletions are crossed through):

Rule 304. Confessions, admissions, and other statements

(a) *General rules.*

* * * * *

(b) *Definitions.*

* * * * *

(c) *Statements allegedly produced by coercion.* When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted if ~~in accordance with this section~~.

(1) ~~As to statements obtained before December 30, 2005, the~~

~~military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.~~

~~(2) As to statements obtained on or after December 30, 2005, t~~ the military judge ~~may admit the statement only if the military judge~~ finds that (i) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
(ii) the interests of justice would best be served by admission of the statement into evidence; and (iii) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109-148 (2005) (codified at 42 U.S.C. 2000dd(d)

4. *Provide for a right of individual military counsel, permitting a right to counsel of choice within the office of the Chief Defense Counsel*

Rule for Military Commissions 506 establishes the right of the accused to be represented by civilian counsel, if provided at no cost to the government, and detailed defense counsel. However, the rules currently do not provide for a right of "individual military counsel" ("IMC")—military counsel of the defendant's selection—as provided in the rules for courts-martial (Rule for Courts-Martial 506). An accused before a military commission who desires to request a military defense counsel other than the one detailed to him has no basis in the existing rules for the request. The proposed rule would permit the accused to make such a request, but to accommodate the unique nature of commissions, the group of officers available to act as IMC would be limited to those officers already detailed to the Office of Military Commissions.

Rule for Military Commissions 506, in pertinent part and as rewritten, would be as follows (the areas underlined would be added):

Rule 506. Accused's rights to counsel

(a) *In general.* The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and <u>by either</u> the defense counsel detailed <u>or by military counsel of the accused's own selection, if reasonably available.</u> The accused is not entitled to be represented by more than one military counsel.

Discussion

See R.M.C. 502(d)(3) for determining qualifications for civilian defense counsel. See R.M.C. 502(d)(6) and 505(d)(2) concerning the duties and substitution of defense counsel. These rules and this Manual do not prohibit participation on the defense team by consultants not expressly

covered by section (d) of this rule, as provided in such regulations as the Secretary of Defense may prescribe, subject to the requirements of Mil. Comm. R. Evid. 505.

(b) Individual Military Counsel

(1) Reasonably available. Counsel are not reasonably available to serve as individual military counsel unless detailed to the Office of Military Commissions to perform defense counsel duties when the request is received by the Office.

(2) Procedure. Subject to this section, the Secretary may prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for individual military counsel shall be made by the accused or the detailed defense counsel with notice to the trial counsel. If the requested person is not reasonably available under this rule, the Chief Defense Counsel shall deny the request and notify the accused. If the requested counsel is not among those listed as not reasonably available in this rule, the Chief Defense Counsel shall make an administrative determination whether the requested person is reasonably available. This determination is a matter within the sole discretion of that authority.

5. *Reverse the burden of proof regarding hearsay statements from a requirement that the opponent establish unreliability to a requirement that the proponent establish reliability.*

Currently, M.C.R.E. 803 requires a person opposing the admissibility of a hearsay statement to bear the burden of establishing that the statement is unreliable. The proposed rule change would shift the burden to require the proponent of hearsay evidence to establish its reliability, as is generally the norm in U.S. courts and as provided in the rules of evidence governing courts-martial. The change would also eliminate an apparent discrepancy between the rule text and the discussion, which states that the proponent of a statement "still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403." While hearsay admissibility remains much broader than in domestic courts, the expansive admissibility standard would be consistent with international standards, such as those employed in international criminal tribunals.

As currently drafted, Military Commission Rule of Evidence 803 provides in pertinent part:

* * * * *

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted if the party opposing the admission of the evidence demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances.

Discussion

The M.C.A. recognizes that hearsay evidence shall be admitted on the same terms as other evidence because many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. Because hearsay is admissible on the same terms as other evidence, the proponent still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403.

As modified, the rule would read:

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted unless the proponent of the evidence demonstrates by a preponderance of the evidence that the evidence is reliable under the totality of the circumstances.

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 15 2009

The Honorable Carl Levin
Chairman, Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with section 949a(d) of the Military Commissions Act of 2006 ("MCA"), attached please find the proposed modifications to procedures for military commissions under the MCA. As required by the MCA, I have consulted with the Attorney General prior to prescribing these procedures and rules for cases triable by military commission.

cc:
The Honorable John McCain
Ranking Member

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 15 2008

The Honorable Ike Skelton
Chairman, Committee on Armed Services
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In accordance with section 949a(d) of the Military Commissions Act of 2006 ("MCA"), attached please find the proposed modifications to procedures for military commissions under the MCA. As required by the MCA, I have consulted with the Attorney General prior to prescribing these procedures and rules for cases triable by military commission.

cc:
The Honorable John M. McHugh
Ranking Member

ATTACHMENT
E

UNITED STATES OF AMERICA v. IBRAHIM AHMED MAHMOUD AL QOSI a/k/a ABU KHOBAIB al SUDANI	**Government Proposed Findings of Fact, Conclusions of Law and Order** **15 May 2009**

1. On January 22, 2009, the President issued Executive Order 13,493, establishing a Special Interagency Task Force on Detainee Disposition ("Detention Policy Task Force" or "Task Force") "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice."

2. The Task Force has been directed to provide a report to the President, through the Assistant to the President for National Security Affairs and Counsel to the President, by 21 July 2009.

3. The President ordered the Secretary of Defense to take action to halt all commission proceedings while the Task Force review took place. The Secretary of Defense directed the Chief Prosecutor of the Office of Military Commissions to seek a 120-day continuance in any case that had been referred to military commission in order to provide the Administration sufficient time to conduct the review. On 26 January 2009, pursuant to a Government motion to continue (P-0001), this court granted a continuance until 20 May 2009.

4. After reviewing the briefs of the parties, and the entire record, the Military Commission finds the following facts:

a. The Task Force review is not yet complete, but significant progress has been made. The President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo.

b. Pursuant to Section 949(d) of Title 10, United States Code, the Secretary of Defense must inform the Committees of the Armed Services of both the House and Senate of proposed modifications to the procedures in effect for military commissions. The proposed modifications to the procedures cannot take effect for 60 days.

c. As a first step, and as a result of the Detention Policy Task Force's initial work, on 15 May 2009, the Secretary of Defense published and notified Congress of five significant changes to the Manual for Military Commissions. The changes submitted on 15 May 2009 will go into effect on 14 July 2009.

d. Conducting further proceedings in this case during the continued Review and upcoming changes in the rules governing military commissions could result in expending effort and resources to litigate issues that might later be rendered moot or that might need to be re-litigated due to changes in the rules or procedures, or might otherwise produce legal consequences affecting the options available to the Administration in its Review.

5. Based upon the foregoing facts, the Military Commission reaches the following conclusions of law:

a. Continuing the proceedings in this case until 17 September 2009 is in the interests of justice because it will permit the President to make the proposed changes to the rules governing military commissions and it will save this case from conducting proceedings that might be affected by rule changes.

b. A 120-day continuance during the rule change review period is in the interests of both the public and the accused, because it will avoid wasted effort in litigating issues that might be rendered moot or might need to be re-litigated by the outcome of that Review, thereby advancing judicial economy, and preventing legal consequences that might affect the options available to the Administration as part of its Review. Changes in the military commissions procedures that could result from a Review of the commissions process might inure to the benefit of the accused.

c. The interests of justice served by a 120-day continuance in this case outweigh the best interests of both the public and the accused in a prompt trial.

d. The Government has not requested this continuance for the purpose of obtaining unnecessary delay, or for any other inappropriate reason.

e. The Government's continuance request is for an appropriate period of time in light of the rule changes and the statutorily required review period.

f. This delay should be excluded when determining whether any time period under Rule for Military Commission (R.M.C.) 707(a) has run.

6. Wherefore, it is this ___ day of May 2009, by this military commission

ORDERED:

1. That further proceedings in this military commission are continued until 17 September 2009.

2. During the pendency of this continuance the requirements of previously ruled upon motions are stayed, compliance dates will be readjusted appropriately, and all other proceedings in this case will be halted.

3. That all delay between today and 17 September 2009 shall be excluded when determining whether any time period under R.M.C. 707(a) has run.

Military Judge

ATTACHMENT F

DECLARATION OF MATTHEW G. OLSEN

Pursuant to 28 U.S.C. § 1746, I, Matthew G. Olsen, hereby declare:

1. I am the Executive Director of the Guantanamo Review Task Force ("Task Force") and Special Counselor to the Attorney General. I was appointed to these positions by the Attorney General on February 20, 2009. Prior to this appointment, I served as a Deputy Assistant Attorney General in the Department of Justice's National Security Division and, more recently, as Acting Assistant Attorney General for National Security. The statements made herein are based on my personal knowledge and information made available to me in my official capacity.

2. The Task Force was created in accordance with Executive Order 13,492, titled "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities." See Exec. Order No. 13,492, 74 Fed. Reg. 4897 ("Executive Order"). The Executive Order, signed January 22, 2009, directs the closure of the Guantanamo Bay detention facility within one year of the date of the order. Id. § 3. To that end, the Executive Order requires "a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay]" to determine whether each detainee can be transferred or released, prosecuted for criminal conduct, or provided another lawful disposition consistent with "the national security and foreign policy interests of the United States and the interests of justice." Id. at §§ 2(d).

3. Section Four of the Executive Order establishes the framework by which this review is to be conducted. The participants to the review are identified as the Attorney General, who shall coordinate the review, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and any other officers or employees of the United States as determined by the Attorney General, with the concurrence of the head of the department or agency concerned. Id. at §§ 4(b).

4. Pursuant to his responsibility to coordinate the review mandated by the Executive Order, the Attorney General established the Guantanamo Review Task Force in late February 2009. The Task Force's responsibilities include assembling and examining relevant information and making recommendations regarding the proper disposition of each individual currently detained at Guantanamo Bay.

5. Specifically, the Task Force is responsible for making recommendations to determine on a rolling basis and as promptly as possible, with respect to the individuals currently detained at Guantanamo, whether it is possible to transfer or release those individuals consistent with the national security and foreign policy interests of the United States, and if so, whether and how the Secretary of Defense may effect their transfer or release. Further, in the cases of those detainees who are not approved for release or

transfer, the Task Force must make recommendations whether the federal government should seek to prosecute those individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution. Finally, with respect to any individuals currently detained whose disposition is not achieved through transfer, release, or prosecution, the Task Force must make recommendations for other lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.

6. The Task Force consists of members from various agencies, including the Department of Defense, the Department of State, the Department of Justice, the Department of Homeland Security, and various elements of the intelligence community. To date, the Task Force has assembled a staff of approximately 50 persons (excluding administrative staff). They are currently grouped into two types of teams for purposes of conducting the reviews of individual detainees mandated by the President's Executive Order: (1) transfer/release teams, responsible for determining whether detainees should be recommended for transfer or release; and (2) prosecution teams, responsible for determining whether the government should seek to prosecute detainees, including whether it is feasible to prosecute detainees in Article III courts. These teams prepare written recommendations in consultation with me, and I submit the recommendations to a Review Panel composed of senior-level officials. The Review Panel members are authorized to decide the disposition of Guantanamo detainees.

7. The work of the Task Force is ongoing. In accordance with the Executive Order, we are making recommendations and decisions on a rolling basis in a manner consistent with certain priorities we have identified since late February. These priorities include detainees subject to court orders from habeas litigation, diplomatic efforts, and detainees facing charges in the military commissions. No final decisions have yet been made whether to continue to prosecute detainees currently charged in the military commission system before the commissions or whether to prosecute these individuals in Article III courts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 14, 2009.

Matthew G. Olsen

ATTACHMENT G

DECLARATION OF
MR. J. BRADFORD WIEGMANN AND COL MARK S. MARTINS

Pursuant to 28 U.S.C. § 1746, we, J. Bradford Wiegmann and Mark S. Martins, hereby declare:

1. On January 22, 2009, the President issued Executive Order 13493, establishing a Special Interagency Task Force on Detainee Disposition ("Detention Policy Task Force" or "Task Force") "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice."

2. The Detention Policy Task Force is co-chaired by the Attorney General and the Secretary of Defense, or their designees, and includes the Secretaries of State and Homeland Security, the Director of National Intelligence, the Director of the Central Intelligence Agency, and the Chairman of the Joint Chiefs of Staff, or their designees.

3. Mr. J. Bradford Wiegmann is a career attorney at the United States Department of Justice, and currently serves as the Principal Deputy and Chief of Staff in the National Security Division. He has also been designated by the Attorney General as Co-Chair of the Detention Policy Task Force.

4. Colonel Mark S. Martins is judge advocate on active duty in the United States Army, assigned as Chief of the International and Operational Law Division of the Office of the Judge Advocate General of the Army. He has also been selected by the Secretary of Defense and the Attorney General to serve as member and Executive Secretary of the Detention Policy Task Force.

5. The Task Force has been directed to provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, by July 21, 2009.

6. The Task Force has assembled a staff, which Mr. Wiegmann and Colonel Martins jointly lead and supervise, of 18 U.S. Government employees, consisting of legal and operational personnel from the relevant national security agencies with expertise in all matters pertaining to its work ("Task Force Staff").

7. The Task Force has established an office at the Department of Justice and has formally requested detailed information from the relevant U.S. Government agencies in a number of areas germane to its work, including information relevant to an assessment of the terrorist threat, basic data on detainees currently or previously held by the United States, and information on existing authorities, practices, and policies with respect to the apprehension and detention of suspected terrorists.

8. The Task Force has met seven times, has developed a detailed plan to accomplish its mission, and is hard at work on the issues it is charged with addressing. Six interagency subgroups of the Task Force meet at least weekly with the Task Force Staff to address more than 20 discrete, but closely interrelated, issues. Formal liaison relationships have been established with the companion task forces established under Executive Orders 13491 and 13492.

9. In addition, the Task Force has begun a series of consultations with Congress and Congressional staff, and with diverse stakeholders and experts within and beyond the Executive Branch, in order to gain the benefit of those who have worked with and studied the complex national security, foreign policy, and legal issues associated with the Task Force's comprehensive mandate.

10. The Task Force review is not yet complete, but significant progress has been made. We have been advised that the President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo and others who may be apprehended in the future.

11. As a first step, and as a result of the Detention Policy Task Force's initial work, on 13 May 2009 the Secretary of Defense published and notified Congress of five significant proposed changes to the Manual for Military Commissions, including rules that would exclude all statements obtained by the use of cruel, inhuman or degrading treatment, impose additional conditions on the use of hearsay, and provide the accused greater latitude in the selection of counsel. As required by law, however, proposed modifications to the procedures in effect in military commissions cannot take effect for 60 days from 13 May.

12. As directed by the President, we plan to take further steps to improve military commissions as part of a broader justice system that best protects U.S. national security and foreign policy interests while also serving the interests of justice. These steps will include working with the Congress on legislation to reform our military commissions system to better serve those purposes.

13. We have been advised that the Administration will shortly be proposing legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, not only to make the five rule changes noted above statutory, but also to make other significant changes to the commissions, including among others revising the rules governing classified evidence, further revising the rules regarding the admissibility of hearsay evidence, and adjusting the class of individuals subject to the jurisdiction of the commissions.

14. We anticipate that these changes will nevertheless permit cases pending before commissions to proceed, though no decisions have yet been made as to which specific detainees will continue to be prosecuted before commissions, whether they might be

prosecuted in Article III courts, or whether some alternative disposition of the detainees might be recommended.

Each of us declares under penalty of perjury that the foregoing is true and correct. Executed on 13 May 2009.

J. BRADFORD WIEGMANN

MARK S. MARTINS

UNITED STATES OF AMERICA **v.** **IBRAHIM AL QOSI**	**P-002** **Defense Response** **To Government Motion for Appropriate Relief (120 Day Continuance)** 22 May 2009

1**.** **Timeliness:** This motion is timely filed in accordance with the Rules for Military Commission. *See* R.M.C. 905(b).

2. **Relief Sought:** NOW COMES the accused, Mr. Ibrahim al Qosi, by and through his undersigned counsel, requesting an R.M.C. 803 hearing at Guantanamo Bay, Cuba, a hearing to which he is entitled under R.M.C. 905(h), after which the Military Judge is requested to:

a. dismiss the charges with prejudice,

b. in the alternative dismiss the charges without prejudice;

c. in the alternative deny the continuance and order a speedy trial; or

d. in the alternative,

(1) deny the Government request for a continuance in so far as it seeks to maintain the "status quo" for 120 days; and

(2) issue and enforce such orders as are necessary to ensure the defense has reasonable access to discovery and witnesses.

This opposition to the Government's request is based on Mr. al Qosi's rights under Rule for Military Commissions (R.M.C.) 707, Rule for Courts-Martial 707, the Fifth and Sixth Amendments to the United States Constitution, Common Article 3 of the Geneva Conventions, the International Covenant on Civil and Political Rights, Article 75 of

Additional Protocol I of the Geneva Conventions, and Customary International Law.

3. **Overview:** This case must be dismissed as the Government has now exceeded the 120-day time limit set in R.M.C. 707. Upon granting the Government's previous 120-day continuance, the Military Judge wisely did not exclude any of the delay from the speedy trial clock. The R.M.C. 707 clock has thus run. Furthermore, the case should be dismissed with prejudice for various reasons detailed below, the primary reason being the negative impact of further delay on Mr. al Qosi's case and well-being. Barring dismissal, the Commission should deny the Government another continuance because the Government has interfered with Mr. al Qosi's ability to prepare for trial during the previous continuance by failing to provide discovery or access to relevant witnesses. The Government will continue its obstructive tactics if the Commission grants another continuance.

4. **Burden and Standard of Proof:** The Government bears the burden of bringing an accused to trial within 120 days. R.M.C. 707(a)(2). When the defense moves to dismiss for lack of speedy trial, the burden of persuasion is on the Government to justify the delay. *See United States v. Cook*, 27 M.J. 212, 215 (C.A.A.F. 1988).

Like its counterpart in the Rules for Court-Martial, R.M.C. 906 provides that "[t]he military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just." R.M.C. 906(b)(1)(Discussion). Unlike the court-martial rules, however, R.M.C. 707 increases the burden on the Government for justifying a continuance by specifically mandating that "the military judge shall grant a continuance or other departure from the requirements of this rule *only upon a finding* that the interests of justice served by taking such action outweigh the best interests of both the public and the accused in a prompt trial of the accused." R.M.C. 707(b)(4)(E)(i) (emphasis added.) By the plain language of this rule, therefore, the Government bears a heightened burden to justify delaying a "prompt trial" for the accused.

5. **Facts:** Mr. al Qosi is unique among all currently charged detainees. He has been charged since February 2004, in other words longer than any of the 19 currently charged detainees. This is not because his case is any more serious than the other detainees (his is in fact probably the weakest of all the charged cases). He was charged early because of a decision by Brigadier General Hartmann, the thrice disqualified legal adviser to the Convening Authority, to try "sexy" cases under the original failed commissions system.[1] Mr. al Qosi's case has turned out to be anything but "sexy," and he has been in legal limbo longer than any other currently charged detainee.[2]

Mr. al Qosi has been in the custody of the United States since 15 December, 2001. Aside from the length of time he has been in legal jeopardy, the U.S. Government has also detained Mr. al Qosi for as long as any detainee. After Pakistanis turned him over to the U.S. Government in December 2001, he spent a few weeks under horrendous conditions in Kandahar, Afghanistan.[3] The U.S. Government then brought him to Guantanamo in January 2002. He thus has been at the mercy of the U.S. Government for well over seven years, including periods of persecution by the same Government now seeking this continuance.

During this period of detention, he obviously has had no trial. Yet, he has been charged under three phases of the Guantanamo debacle, without resolution of his case. First, in February 2004, under the illegal Military Commissions Order of the President, the previous administration shocked him, his family (his father was 75 at the time; his mother 70) and his hometown of Atbara, Sudan, by levying allegations against him of being in cahoots not with other cooks, but with Usama Bin Laden himself in planning

[1] "U.S. Judge Barred from Another Guantanamo Trial," *Reuters*. August 14, 2008. http://www reuters.com/article/topNews/idUSN1337894520080814.
[2] Three other detainees were charged along with Mr. Al Qosi, but all are done with their trials. They are David Hicks (released after a deal was struck between then-Vice President Cheney and the Australian Prime Minister), Salim Hamdan (released after trial) and Ali Al Bahlul (serving life imprisonment after refusing to defend himself at trial and glorying in being an Al Qaeda promoter).
[3] The defense has asked for discovery of any documentation, information, etc., surrounding Mr. Al Qosi's capture and release to U.S. authorities, but our requests have been fruitless.

terrorist attacks.

After waiting over two years, Mr. Al Qosi and his family watched with hope as two Presidential Orders were struck down, the last ultimately by the Supreme Court, in June 2006. Thereafter, the Government brought new, vastly attenuated allegations against him under the Military Commissions Act. These new charges were not brought until February 2008. And time has continued to pass.

The defense fought for discovery and movement in the case. It brought motions and awaited rulings. Then, on January 23, 2009, the U.S. Government took Mr. Al Qosi, his family, the Atbara citizenry and the Sudanese government (now fully engaged in seeking repatriation) into phase three of legal limbo. The Government sought and obtained a 120-day halt of the Commissions, pending an ostensible review of the case files of all Guantanamo detainees.

The military judge did not order excludable delay during the period of the 120-day continuance the government requested on 23 January 2009. *See United States v. al Qosi*, Ruling: Government Request for a Continuance, 26 January 2009. In addition, many days were not excluded from the R.M.C. 707 clock prior to this continuance. During this 120-day halt begun in January, moreover, the Government provided no discovery, did not respond to any old discovery requests submitted on behalf of Mr. al Qosi, and did not grant access to requested witnesses -- witnesses it had previously told this Commission it would make available to the defense. Other than approving Protective Orders and the Government continuance request, the military judge has not ruled on motions filed and argued in 2008.

The defense nonetheless has sought to move forward by meeting with Mr. al Qosi's family, the citizenry and representatives of Atbara, Sudan (Mr. al Qosi's home

town), former Guantanamo detainees, and government representatives of the Republic of Sudan whose equivalents in the U.S. would be the heads of the State Department, the CIA, the Senate and House, top Presidential aides, as well as the Sudanese Bar Association (not to mention multiple Arab news media outlets). These meetings highlighted the very viable option of Mr. al Qosi's repatriation to his home country of Sudan. As Mr. al Qosi reported to the President's Guantanamo Review Task Force:

> The activities of former Guantanamo detainees who have returned to Sudan are monitored closely by the Sudanese intelligence services, which produces a regular report regarding all Sudanese detainees' employment, any travel, and family ties. Sudanese intelligence representatives, who met at length with detailed counsel during their visit to Sudan, read one such report to counsel, in the presence of U.S. intelligence personnel who were aware that such reports are generated. It was apparent that the latter shared a collaborative relationship with Sudanese intelligence in closely monitoring former detainees. Indeed, U.S intelligence personnel asserted to detailed counsel that repatriation of the Sudanese detainees remaining at Guantanamo was "the right thing to do."

Supplemental Submission of Ibrahim al Qosi to Guantanamo Review Task Force, 15 May 2009.

Mr. al Qosi has been locked in three variations of legal limbo, as he has grown from a 41- year-old man to a man set to turn 50 this year. Meanwhile his daughters have grown from little girls to teens, and a multitude of friends and family in Sudan have stood aghast at the opaque machinations of U.S. "military justice." And now, the Government comes, once again, to continue Mr. Al Qosi's ordeal for the entire summer, another four months, with implied promises of benefits Mr. al Qosi will one day enjoy but with no assurance whatsoever when his legal ordeal will be resolved.

6. **Law and Argument:**

a. The charges must be dismissed because the Government was not granted excludable delay for its last continuance and the R.M.C. 707 clock has run.

(1) Dismissal is the appropriate remedy.

Like its counterpart in the Rules for Court Martial, Rule for Military Commissions 707 is a rule of strict timelines requiring dismissal if the timelines are not met. Congress delegated to the Secretary of Defense, pursuant to the Military Commissions Act of 2006, the authority to prescribe rules for Military Commissions. *See* 10 U.S.C. § 949a. R.M.C. 707 is an exercise of that delegated authority, and therefore has the force of law. *Cf. United States v. Kossman,* 38 M.J. 250, 260 (C.A.A.F. 1993)(noting that Congress statutorily delegated to the President the authority to prescribe procedures for courts-martial under 10 U.S.C. § 836a, and that Rule for Court-Martial 707 addressing speedy trial rights, as an exercise of that statutory authority, "has the force and effect of law.")

The Government bears the burden of bringing an accused to trial within the time period prescribed in Rule 707. *See United States v. Cook*, 27 M.J. at 215. Here the Government has violated the timeline requirements set out in R.M.C. 707(a)(3). That rule reads, "Within 120 days of the service of charges, the military judge shall announce the assembly of the military commission, in accordance with R.M.C. 911." Mr. al Qosi has been charged, but this Commission has not announced the assembly of the military commission so the 120-day rule is implicated. Prejudice is not at issue on the question of whether charges should be dismissed. Prejudice is only at issue on the question of whether the dismissal comes with or without prejudice. *See* R.M.C. 707(d)(1).

As with court-martial practice under the Uniform Code of Military Justice, R.M.C. 707 does allow exclusion of delay, including for a "continuance granted only in

the interest of justice." Any such exclusion, however, can occur only where certain other requirements of the rule are met. First, R.M.C. 707 directs that "[t]he military judge shall grant a continuance or other departure from the requirements of this rule *only upon a finding* that the interests of justice served by taking such action outweigh the best interests of both the public and the accused in a prompt trial of the accused." R.M.C. 707(b)(4)(E)(i) (emphasis added).

Second and most importantly, R.M.C. 707 reads unequivocally that

> [n]o such period of delay resulting from a continuance granted by the military judge in accordance with paragraph (b)(4)(E)(i) shall be excludable unless the military judge sets forth, in the record of the case, either orally or in writing: (A) the military judge's reasons for finding the interests of justice served by the granting of such continuance outweighs the best interests of both the public and the accused in a prompt trial of the accused, and (B) the identity of the party or parties responsible for the delay.

R.M.C. 707(b)(4)(E)(ii).

Thus on 26 January 2009, this Commission granted the continuance, but in accordance with these rules wisely did not grant excludable delay. The rule, by its plain language, makes such an on-the-record finding a *prerequisite* to excluding delay. Denying any excludable delay was the right decision as the Government had no compelling reason not to simply dismiss Mr. Al Qosi's case without prejudice. The Government sought a delay for its own procedural, administrative reasons. Thus, any delay that was granted must be counted against the Government.

The rule sets a clear timeline and a clear remedy for violation. The Government has exceeded its 120-day time limit. Dismissal is the only appropriate remedy.

(2) Dismissal *with prejudice* is the appropriate remedy.

Dismissal with prejudice is appropriate. First, the fact statement in this brief lays out much of the prejudice to Mr. al Qosi in the sheer length of time he has been confined, charged and untried. Furthermore, according to CAAF and the Supreme Court,

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.
>
> *Barker v. Wingo*, 407 U. S. 514, 532 (1972) (footnote omitted), quoted in *United States v. Mizgala*, 61 M.J. 122, 129 (2005).

But as then-Chief Judge Crawford has also explained,

> [a]fter arraignment, "the power of the military judge to process the case increases, and the power of the [Government] to affect the case decreases." As a result, once an accused is arraigned, significant responsibility for ensuring the accused's court-martial proceeds with reasonable dispatch rests with the military judge. *The military judge has the power and responsibility to force the Government to proceed with its case if justice so requires*.
>
> *United States v. Cooper*, 58 M.J. 54, 60 (2003) (emphasis added)(internal citations omitted)

The oppressive treatment of Mr. al Qosi has been described in some detail in the defense's motion to suppress his statements. Additionally, the length of his confinement and the fact that he was kept like a dog in an outdoor cage for months, and maintained in solitary confinement for even longer, is profoundly oppressive. Obviously, another four months of delay raises incredible anxiety and concern for him. It might be easy to ignore four months because in the grand scheme of 8 years it seems like a short time, but that

sort of thought is only an indicator of how absolutely warped and offensive the Military Commissions system has become.

Another most important factor in the prejudice analysis is impairment to the defense. Witnesses from the relevant timeframe in this case have lost memories of what happened (but as explained below, due to the Protective Orders in place, even this fact is difficult to demonstrate). Mr. al Qosi himself now is unable to put events in time order , a fact which will make the defense's suppression motion that much harder. And these obstacles arise because the Government has dragged its feet for years and made glaring strategic errors, particularly in its decision to concoct a brand new system of justice when courts-martial and federal courts were available to handle Mr. al Qosi's case. Furthermore, as explained below, the last 120-delay specifically harmed the defense's trial preparation by drying up discovery and witness access.

Mr. al Qosi is also prejudiced by the prosecutors' not dismissing the charges: the stigma attached to Mr. al Qosi as a *charged detainee* greatly diminishes his chances at repatriation. It is the defense's understanding[4] that keeping Mr. al Qosi charged places him in a unique category of repatriation review led by the Department of Justice. This categorization was highlighted in President Obama's most recent speech at the National Archives, where he disturbingly discussed Commissions detainees as being in a separate category than those being considered for release.[5] From discussions with the Department of Justice (DOJ) and press reports, release determinations on Commissions detainees are made by a group of prosecutors at DOJ, some of whom previously worked at the Military Commissions Prosecution office. The stigma that attaches to Mr. al Qosi as a

[4] The U.S. Government is free to refute this point with specific facts, considering it is in the best position to explain the inner workings of its own Task Force.
[5] President Obama, Speech on Guantanamo Bay at National Archives, Full Text, 21 May 2009, www.politico.com/news/stories/0509/22825_Page4 html.

Commissions detainee, whose case is being reviewed by prosecutors, makes his release less likely, and a political liability, since releasing a "charged terrorist" would play into the hands of those who oppose President Obama's efforts to close Guantanamo Bay.

The prejudice that attaches from the pending charges exists in spite of the now-document reality (noted in the facts above), that intelligence personnel from both the United States and Sudan are confident the prompt repatriation of Mr. al Qosi is appropriate. Mr. al Qosi has an excellent case for repatriation: he has extremely weak charges (indeed, his case does not even amount to that of Mr. Salim Hamdan, who received a 66-month sentence and was acquitted of one of the two charges against him), highly questionable evidence, a strong network of family support in Sudan and a home country to which he can return without fear of persecution. Furthermore, the Sudanese government fully supports his repatriation, and of the nine Sudanese detainees returned from Guantanamo Bay, Sudanese officials are proud of the fact that each detainee is now a productive, trustworthy, non-radical member of society.[6] Mr. al Qosi can get no fair adjudication of his repatriation case before DOJ, as he is highly prejudiced by the stigma of a charge sheet that the government interminably hangs over his head with its requests for lengthy continuances. The stigma directly affects his ability to get a review of his repatriation case based on the true merits. In keeping him charged when it could dismiss his case, the Government denies him the right to a fair and meaningful review.

Third and finally, on the prejudice question, Mr. al Qosi has been effectively cut off from meaningful relief on his habeas petition, because he is a charged detainee. The federal judge reviewing the habeas petition has deferred action since the Supreme Court

[6] Indeed, as it accounts for all its repatriated detainees, Sudan has a better success rate of rehabilitation of former detainees than does the often-vaunted Saudi Arabian rehabilitation program.

ruling in *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2275 (2008), in deference to this pending Commission. Though the habeas case has started to move forward a bit, the Article III Court is generally poised to delay any action pending movement in this Commission -- where the Government is seeking further delay with no real end in sight. For all these reasons, the charges should be dismissed with prejudice.

(3) This Commission Should not Exclude the Delay After the Fact.

In this Commission's ruling on the Government's previous continuance request, the Commission wrote, "The Government's *unopposed* Request for a Continuance until 20 May 2009 is hereby GRANTED." *See United States v. al Qosi*, Ruling, 26 January 2009 (emphasis added). Though the defense filed no formal opposition to the continuance, it also did not agree to it. The Government put Mr. al Qosi in a terrible Catch-22: if he agreed to the continuance, he was implicitly agreeing to more delay after all this time; if he opposed the continuance, he faced a blatantly illegal trial. Furthermore, the defense had outstanding discovery requests, motions, and witness interviews, and no reason to believe that the granting of the continuance would preclude progress in those areas.

The 120-day rule in R.M.C. 707 is a bright-line rule. Post-hoc rationalizations for continuances to justify government delay are inappropriate. *See Cook*, 27 M.J. at 214 (eschewing "informal, after-the-fact allocation to the defense of a 'reasonable' period of delay" as not meeting the demands of R.C.M. 707, and finding that "[t]he burden is on the Government to bring an accused to trial within 120 days."). "Each day that an accused is available for trial is chargeable to the Government, unless a delay has been approved by either the convening authority or the military judge, in writing or on the record." *Id.* at 215. The absence of any reason in the record for excluding the

Government delay granted on 26 January 2009 means that Rule 707's clock has run against the Government, and dismissal is appropriate.

With this latest Government request for a continuance, Mr. al Qosi still finds himself in this same Catch-22, and at this point has to overtly oppose the continuance and face his fate with a rigged trial system. The Supreme Court best explained the reasons for this stance: "While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody." *Boumediene*, 128 S.Ct. at 2275. For his own sanity and the health and well-being of his now 75 and 80 year old parents, Mr. al Qosi must move out of the legal quagmire in which he finds himself.

Mr. al Qosi's Father

Mr. al Qosi's Mother

This Commission has a duty to justice and the accused. That duty requires this Commission to dismiss these charges with prejudice, or in the alternative to deny this continuance.

b. Speedy Trial Demand.

United States law abhors a vacuum, particularly one surrounding a human being both confined and under legal jeopardy. Mr. al Qosi has been in U.S. custody since 2002 and has had an actual charge sheet for *five years*. In any U.S. system of justice, the right to a speedy trial is a fundamental right designed to extract a human being from a legal

vacuum. *See, e.g.*, *Mizgala*, 61 M.J. at 124 (explaining the right to a speedy trial is "fundamental" and "unquestionably…a substantial right.") The right finds its origins in the Magna Carta, and was designed for cases such as this one, where the sovereign confines a person who then languishes interminably, a punishment the Founders considered to be of unusual, deplorable cruelty. Of course the writ of *habeas corpus* is an age-old remedy for illegal confinement, but as explained above, that writ has not sufficed to protect Mr. al Qosi.

Accordingly, the accused hereby demands a speedy trial. While the defense is sorely tempted to wait yet another 120 days for promised "reform" of the Commissions rules, the last 120 days have proven that the defense would be foolish to do so. During the last 120 days, the Government has frozen discovery and the production of witnesses for interview despite the R.M.C's promise of "reasonable opportunity to obtain witnesses and other evidence…." *See* R.M.C. 703(a).

(1) During the last continuance, discovery has been precluded.

In September of last year, Col Lawrence Morris, then the OMC Chief Prosecutor, was faced with a scandal when a highly decorated Lieutenant Colonel resigned from his office on the grounds that it was impossible for him to provide adequate discovery to the defense. In response, Col Morris told the press, "We are the most scrupulous organization you can imagine in terms of disclosure to the defense."[7] This contention is questionable, to say the least. Last year prior, to any continuance issues arising in this case, the Government ignored for weeks a Commission-imposed deadline for providing discovery. Eventually, this Commission had to threaten the Government that they would not be allowed to use any evidence produced after a date certain.

[7] Finn, Peter. "Guantanamo Prosecutor Quits, Says Evidence was Withheld," 25 Sep 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/09/24/AR2008092402101 html.

Despite this admonition from the Commission, during the period of the last 120-day continuance, the Government has neither provided discovery nor a written reply to any one of the four discovery requests (one classified) that it received from the defense from 1 December 2008 to 5 January 2009 (*i.e.* before the January continuance). In fact on 27 February 2009, the lead trial counsel specifically wrote to the defense, "We will not be providing discovery during the period of the current continuance."

A continuance is not supposed to stall the discovery process. Rather, it should afford the Government time to provide more discovery or at a minimum to respond to requests.

(2) During the continuance, promised witness interviews have been denied.

Prior to this Commission granting the last continuance, the defense filed a motion to suppress statements obtained through coercion/torture. In that motion, the defense pointed out that it needed to interview interrogators and other personnel regarding the treatment of Mr. al Qosi that led to him allegedly making statements to the Government. The Government replied that it would only introduce two statements allegedly taken from Mr. al Qosi in July 2002 and May 2003. With regard to the agents who took those statements, the Government asserted that "[t]he defense has never requested access to interview the personnel who interviewed the accused in July 2002 and May 2003." But, it also wrote that "the prosecution can make the interviewers available to the Defense." Just prior to argument on this motion to suppress, the Government requested and received its continuance.

On 1 April 2009 (during the continuance), the defense, sent the Government a request to interview the interrogators who took the July 2002 and May 2003 statements.

Over a month and a half has passed without a Government response to this request.[8] This silence reflects the Government's response regarding discovery generally: during the period of the continuance, access to witnesses will not be provided.

This lack of witness access further demonstrates that the most recent continuance request must be denied. Any additional continuance will only allow the Government to further stonewall the defense's trial preparation. Being denied reasonable access to these witnesses is particularly problematic here, where the Government received this Commission's approval, over defense objection, of Protective Orders that effectively prevent the defense from investigating the suppression issues without Government assistance. As noted in the defense objection to the Protective Orders, if and when the defense actually find ex-guards who served at GTMO five years ago, the Protective Orders prevent defense counsel from using available pictures of Mr. al Qosi (taken at GTMO by JTF), when seeking to remind any guard of who the detainee is. Furthermore, the Protective Orders effectively preclude asking any guard about misconduct he or she may have seen other interrogators engage in, because the defense is prohibited from revealing the names of interrogators, including the names of the two interrogators who took the statements the Government intends to introduce. Thus, the defense is stuck: it cannot effectively interview witnesses, and the Government will not make the only witnesses who are sure to remember Mr. al Qosi available for an interview during the continuance.

c. <u>Conclusion</u>

As a starting point, the R.M.C. 707 violation makes the continuance request moot. The case must be dismissed because the Government has violated the black-and-white

[8] The request was received by the government as evidenced by their reply email of 3 Apr 09 at 2:19 pm.

timeline requirements of the rule. The case should be dismissed with prejudice because of the harm the delay has caused Mr. al Qosi. Barring dismissal, the question is how this Commission can best apply the standard from R.M.C. 707(b)(4)(E)(i). The interests outlined by the Government are outweighed by the public's and Mr. al Qosi's interest in a prompt trial. Any more "continuances" only allow the Government to persist in avoiding its discovery responsibilities and to "unreasonably impede" the defense's exercise of its right to an "adequate opportunity to prepare its case." *See* RMC 701(j). Accordingly, the defense moves for dismissal, or in the alternative, denial of the continuance and a speedy trial.

7. **Request for Oral Argument:** In accordance with R.M.C. 905 (h) the Defense requests an R.M.C. 803 session to present oral argument, a right to which it is *entitled* under the rule.

8. **Witnesses and Evidence:** The defense reserves the right to call witnesses in support of this motion.

9. **Additional Information:** The defense hereby respectfully requests that the Military Judge authorize the Assistant Secretary of Defense for Public Affairs (or designee) to release this pleading to the public at the earliest possible date. In making this motion, or any other motion, Mr. al Qosi does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in all appropriate forums.

Respectfully submitted,

By: ***Travis J. Owens***
CDR S.M. Lachelier, JAGC, USN
LCDR T. J. Owens, JAGC, USN
Maj T. E. Pierce, JA, USN
Detailed Defense Counsel for
Ibrahim al Qosi

Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

UNITED STATES OF AMERICA	)	**P-002**
	)	**Government Reply to Defense Response to Government Motion for Appropriate Relief**
v.	)	**28 May 2009**
IBRAHIM AHMED MAHMOUD AL QOSI a/k/a ABU KHOBAIB al SUDANI	)	

1. Timeliness: This reply is timely filed.

2. Relief Requested: The Government respectfully requests the Military Commission grant the continuance until 17 September 2009 requested by the Government in the Motion for Appropriate Relief currently pending before the Commission, and hold all time from 26 January 2009 to 17 September 2009 excluded for the purpose of computing compliance with Rules for Military Commissions (R.M.C.) 707(a).

3. Overview: In response to the Government's 15 May 2009 Motion for Appropriate Relief, the accused seeks dismissal of the charges based on lack of speedy trial. In support of this motion, the accused specifically relies on the Commission's silence regarding excludable delay in its 26 January 2009 order granting a 120-day continuance.

4. Burden and Persuasion: The Government bears the burden of persuasion. *See United States v. Cook,* 27 M.J. 212, 215 (C.A.A.F. 1988).

5. Facts:

a. On 23 January 2009, the Government sought a 120-day continuance of the proceedings in the instant case pursuant to R.M.C. 707(b)(4)(E)(i). P-001 Motion for Appropriate Relief (120-Day Continuance). The accused did not object to this request.

b. On 26 January 2009, the Commission granted a 120-day continuance requested by the Government, but did not explicitly state, at that time, that the delay was excludable for purposes of determining compliance with R.M.C. 707(a).

c. On 15 May 2009, the Government requested a second 120-day continuance, again pursuant to R.M.C. 707(b)(4)(E)(i). In this motion, the Government specifically requested that the delay be excluded under R.M.C. 707(c).

d. On 22 May 2009, in a response to the Government's Motion for Appropriate Relief (120-Day Continuance), the accused both opposed the continuance and sought dismissal of the charges based on lack of speedy trial.

6. Argument:

a. The Commission should grant the Government's Motion for Appropriate Relief (120-Day Continuance) and approve a continuance until 17 September 2009.

(1) As explained in the Government's Motion, the interests of justice are served by granting this additional 120-day continuance, and those interests outweigh the best interests of both the public and the accused in a prompt trial. It is unnecessary to simply repeat here the arguments in favor of granting the continuance made in the Government's motion. Rather, it is sufficient to observe that despite the length of time that the accused has been detained, he has not been so detained in pretrial confinement, but rather on the wholly independent basis, under the international law of armed conflict, that he is an enemy combatant. Further, while the Defense Response makes various allegations that the continuance now requested by the Government will prejudice the accused's ability to defend himself, the Response actually fails to identify with any particularity at all how the delay will actually prejudice the accused.

(2) Given the extraordinary circumstances underlying the Government's request for this additional continuance, the orderly and efficient administration of justice require the Commission to grant the requested delay, to conclude that such delay is in the interests of justice, and that the interests of justice outweigh the interest of the public or the accused in a speedy trial.

b. The Commission should deny that portion of the Defense Response that seeks to dismiss the case.

(1) The Defense is wrong when it states "[t]he Government has exceeded its 120-day time limit" in this case. *See* P-002 Defense Response to Government Motion for Appropriate Relief (120 Day Continuance) at 7. The 120-day continuance the Commission granted on 26 January 2009 is excludable delay, and the Commission should now explicitly hold that such time is excluded and deny the Defense motion to dismiss on speedy trial grounds.

(2) As the Defense Response correctly observes, the Commission's ruling simply stated, "The Government's unopposed Request for a Continuance until 20 May 2009 is hereby GRANTED." *See* P-002 Defense Response to Government Motion for Appropriate Relief (120-Day Continuance) at 11, quoting *United States v. al Qosi*, RULING: GOVERNMENT REQUEST FOR A CONTINUANCE (26 January 2009). The Government's continuance request, however, explicitly relied on R.M.C. 707(b)(4)(E)(i), which permits a military judge to grant a continuance *only* upon a finding that the interests of justice are served by the continuance and outweigh the accused's and the public's interest in a prompt trial. *See* P-001 Government Motion for Appropriate Relief (120-Day Contiuance) at 2, ¶ 6.a.

(3) As the Defense also notes, in order to exclude time under R.M.C. 707(c), the military judge must put certain findings on the record. R.C.M. 707(b)(4)(E)(ii); P-002 Defense Response to Government Motion for Appropriate Relief (120 Day Continuance) at 7. Nothing in the Rule, however, requires that such findings be put on the record contemporaneously with the granting of the continuance, as the Defense argues. *See id.* at 7, 11. Further, neither federal courts nor the military appellate courts require as much and, in fact, have approved of quite the opposite.

(a) The United States Supreme Court confronted this very issue just three years ago, in *Zedner v. United States*, 547 U.S. 489 (2006). There, the Court looked at the Speedy Trial Act, 18 U.S.C. § 3161 (2008), which contains remarkably similar language to R.M.C. 707(b)(4)(E)(i) and (ii). The Speedy Trial Act allows a federal district court judge to grant an "ends-of-justice continuance" if he finds that "taking such action outweigh[s] the best interest of the public and the defendant in a speedy trial." *Cf.* R.M.C. 707(b)(4)(E)(i). Furthermore, the Speedy Trial Act provides that "[n]o such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A); *cf.* R.M.C. 707(b)(4)(E)(ii).

(b) The Court first recognized that, not unlike R.M.C. 707(b)(4)(E)(ii), "without on-the-record findings, there can be no exclusion under" the Speedy Trial Act. *Zedner*, 547 U.S. at 506. The Court went on to conclude that the Speedy Trial Act

> is clear that the findings must be made, if only in the judge's mind, before granting the continuance . . ., [but] the Act is ambiguous on precisely when those findings must be "se[t] forth, in the record of the case." However this ambiguity is resolved, at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss [for violation of speedy trial].

Id. at 507. This precedent, because of the similar language, conditions, and requirements between the Speedy Trial Act and R.M.C. 707, undoubtedly authorizes this commission to put on the record now the reasons for granting the Government's January continuance request.

(c) The federal courts of appeal provide further support for this authority. In fact, "virtually every Circuit has held that" "[r]ather than contemporaneous findings, section 3161 merely requires that a district court enter on the record, at some point (presumably prior to trial), the necessary findings to support an ends-of-justice continuance." *United States v. Bieganowski*, 313 F.3d 264, 283 (5th Cir. 2002); *see also United States v. Apperson*, 441 F.3d 1162, 1180 (10th Cir. 2006) ("the trial court's findings 'may be entered on the record after the fact, they may not be made after the fact.'"); *United States v. Brenna*, 878 F.2d 117, 122 (3d Cir. 1989) ("a district judge may detail his reasons for granting an ends of justice continuance some time after he enters the order granting such a continuance"); *United States v. Brooks*, 697 F.2d 517, 522 (3d Cir. 1982) (finding that "the Act does not require a contemporaneous recording of reasons"); *United States v. Tunnessen*, 763 F.2d 74, 78-79 (2d Cir. 1985) (same); *United States v. Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981) (same); *United States v. Edwards*, 627 F.2d 460, 461 (D.C. Cir. 1980) (same); *United States v. Bryant*, 726 F.2d 510, 511 (9th Cir. 1984) ("Although the Act requires that the trial court prepare a record, we find nothing in either the language or the purpose of the Act that requires the court to prepare the record at the precise moment it grants a continuance.").

(d) Likewise, in *United States v. Lazauskas*, 62 M.J. 39, 40 (C.A.A.F. 2005), the Court of Appeals for the Armed Forces (C.A.A.F.) affirmed a military judge's denial of a motion to dismiss for violation of Rules for Courts-Martial (R.C.M.) 707, after having expressly recognized that "the military judge found a total of fifty-eight days retroactively excludable." *See also United States v. Proctor*, 58 M.J. 792, 796 n.1 (A.F.C.C.A. 2003) (noting that "R.C.M. 707 does not preclude a convening authority from granting a delay after the fact."). "The threshold requirement for excluding any period of time from speedy trial accountability under R.C.M. 707(c) is whether a delay was in fact granted by a person authorized to grant such a delay." *United States v. Arab*, 55 M.J. 508, 512 (A.C.C.A. 2001). In this case, the Commission was authorized to grant the Government's requested 120-day continuance and so granted the Government's request.

(e) Further, the issue of the excludability of the continuance time was, arguably, not ripe for decision by this Commission until the Defense moved to dismiss on speedy trial grounds. The Defense did not oppose the Government's 26 January continuance request. Nor did it demand a speedy trial at that time or seek an accounting of time for speedy trial purposes. Thus, the only issue for the Commission to decide on 26 January 2009 was whether to grant the Government's request for a continuance. The commission did not need to decide at that time whether the time sought by the Government was excludable or should have been excluded from the speedy trial calculation.

(1) The plain language of R.M.C. 707 demonstrates that a military judge need not exclude time for speedy trial purposes unless and until she must determine whether the time periods listed in R.M.C. 707(a) have run. *See* R.C.M. 707(c) (requiring "[a]ll . . . pretrial delays approved by the military judge in accordance with subsection (b)(4) of this rule . . . shall be excluded **when determining** whether any time period in section (a) of this rule has run.") (emphasis added). Indeed, R.M.C. 707(b)(4)(E)(i) requires a military judge to grant a continuance upon a showing that the interests of justice served by the continuance outweigh the accused's and the public's interest in a prompt trial. R.M.C. 707(b)(4)(E)(ii) states that such a continuance is "excludable," provided certain requirements are met, but does not require the military judge to exclude the continuance at the time she grants it.

(2) Thus, arguably, the appropriate time to decide whether certain delays can be excluded from R.M.C. 707(a)(2)'s 120-day requirement is when the Defense challenges the processing of the accused's case. *Cf. United States v. Lazauskas*, 62 M.J. 39 (C.A.A.F. 2005); *United States v. McDuffie*, 65 M.J. 631, 634 (A.F.C.C.A. 2007); *United States v. Proctor*, 58 M.J. 792, 796 (A.F.C.C.A. 2003); *United States v. Arab*, 55 M.J. 508, 512 (A.C.C.A. 2001); *United States v. Nichols*, 42 M.J. 715, 722 (A.F.C.C.A. 1995). In *Lazauskas*, 62 M.J. at 40, the C.A.A.F. approved a military judge's decision that "found a total of fifty-eight days **retroactively excludable**" (emphasis added), done at the time the defense brought its motion to dismiss for violation of R.C.M. 707 rather than at the time delays had been granted.. Such a decision comports with the Court's previous case law, as it had said R.C.M. 707 "**does not preclude after-the-fact approval** of a delay . . . that otherwise meets good-cause and reasonableness-in-length standards." *United States v. Thompson*, 46 M.J. 472, 475 (C.A.A.F. 1997) (emphasis added).

(3) Since the Defense apparently has now raised a speedy trial motion, *see* P-002 Defense Response to Government Motion for Appropriate Relief (120 Day Continuance) at 2, 6-7, it would now be ripe for this Commission to determine whether the 120-day continuance should be excluded from the R.M.C. 707(a)(2) time period. As explained above, the Commission should now put on the record the findings required by R.M.C. 707(b)(4)(E)(ii), and hold that the delay is excluded from the calculation of time under R.M.C. 707(a), and deny the Defense motion to dismiss.

7. Conclusion: For the foregoing reasons, the Commission should (1) grant a continuance of further proceedings in the above-captioned case until 17 September 2009 and (2) adopt the Findings of Fact, Conclusions of Law and Order attached to the Government's motion dated 15 May 2009, and order all time granted in continuances since 26 January 2009 excludable under R.M.C. 707(b)(4)(E)(i).

8. Oral Argument: The Government does not request oral argument, but is prepared to argue should the commission find it helpful.

9. Witnesses and Evidence: All of the evidence necessary to support this reply is in the record.

10. Submitted by:

K. Sachs
Maj, U.S. Air Force
Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301
[redacted]

S. Quinn
Capt, U.S. Marine Corps
Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301
[redacted]

T. Cox
Capt, U.S. Air Force
Trial Counsel
Office of Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301
[redacted]